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Supreme Court of the United States

OCTOBER TERM, 1949.

No. 519.

VIVIAN COWGILL MENEES, PETITIONER,
VS.
LILLIAN COWGILL ET AL., RESPONDENTS.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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STATEMENT.

The petitioner here was the plaintiff in the circuit court and the appellant in the Supreme Court of Missouri. We shall hereafter refer to her as the petitioner.

The case was decided in the Circuit Court of Jackson County, Missouri, on petitioner's motion for judgment on the pleadings (R. 20-21). In order that the issues in the Missouri courts may be before this court, we state as briefly as we may the substance of the pleadings (R. 4-20).

In the Circuit Court of Jackson County, Missouri, the petitioner filed her "Petition for Declaratory Judgment," alleging that in 1920, when she was a small child, Guy M. Cowgill and Lillian Cowgill, his wife, at Kansas City, Missouri, where the Cowgills resided, had promised the petitioner's father that if he would give her to them, the Cowgills, they would adopt her; that her father had given her to the Cowgills at Kansas City, Missouri; that she had lived with the Cowgills, at Kansas City, Missouri, until 1936 as their child, discharging all the duties of a child toward them; that Guy M. Cowgill had died in February, 1936, a resident of Kansas City, Missouri, and that thereafter petitioner continued to reside with Lillian Cowgill until petitioner's marriage in July, 1936, after which she resided with her husband in Kansas City, Missouri; that Guy M. Cowgill left a will; that she was named as his daughter and as a beneficiary in said will, and that administration upon the estate of Guy M. Cowgill had been completed and the executrix discharged.

The petitioner further alleged that on April 11, 1945, Clara Cowgill Cochrane, a resident of Montgomery County, Iowa, and a sister of Guy M. Cowgill, deceased, died testate as to a portion of her property, leaving surviving her "neither parent, no spouse, no natural or adopted child, no issue, nor descendant"; that she left a will, which contained no residuary clause, and that she died intestate as to a part of her property; that the petitioner had made a claim that under the laws of descent and distribution of the State of Iowa, she was entitled to have and receive all the real and personal property of the decedent, Clara Cowgill Cochrane, which constituted the intestate part of the property of which she died seized, and that notice of said claim had been filed in Montgomery County, Iowa; that as a further basis of her claim (R. 12) to the intestate

property of Clara Cowgill Cochrane, deceased, petitioner relied on the laws of the State of Iowa.

Petitioner further alleged that "statutory formulas required by law relating to the adoption of children" were not complied with, and prayed the court for a decree that she was the adopted child of Guy M. Cowgill and Lillian Cowgill, as against all of the defendants (who were the executor of Clara Cowgill Cochrane's will, and a great number of Clara Cowgill Cochrane's collateral kin).

The defendants denied that the petitioner was ever adopted by the Cowgills, or either of them, and further alleged that none of them was a party to said contract to adopt made by the Cowgills, and prayed for a declaratory judgment that as to them the petitioner was not the adopted child of Guy M. Cowgill. The judgment of the circuit court was in effect that as to the defendants, except Lillian Cowgill, the petitioner was not entitled to a decree that she was an adopted child. The petitioner appealed. Lillian Cowgill, who was petitioner's blood aunt, did not appeal.

The Doctrine of Equitable Estoppel, in Missouri.

As shown by the opinion of the Supreme Court of Missouri in this case (R. 42), reported as *Menees* v. *Cowgill*, 223 S. W. 2d 412, and the authorities cited therein, equitable adoption, which is peculiar to Missouri, does not create the *status* of adoption as against the world. As said in the court's opinion in this case (R. 51):

> "A decree of equitable adoption merely forecloses 'the parties to the suit against a denial of the status that the court declares' and the status decreed exists only in equity and against the judgment defendants."

"Equitable adoption" is not an alternative to the statutory form of adoption. It is decreed to prevent fraud or

wrong doing, and to prevent the person who has made the promise to adopt from taking advantage of the child for the promisor's benefit. It affects nobody but the promisor and *his* estate. Under such an adoption the person so adopted does not, by reason of such equitable adoption, inherit from the natural children of the promisor (*Weber* v. *Griffiths*, 349 Mo. 145, 159 S. W. 2d 670), or from the ancestors of the promisor, or from any of his collateral kin (*McIntyre* v. *Hardesty*, 347 Mo. 805, 149 S. W. 2d 334). Thus it is seen that under such equitable adoption the person so adopted takes only *from* the promisor and *his* estate, but never takes *through* the promisor. The promisor and his estate are estopped by the decree from denying an adoption, and this is as far as any Missouri case has ever gone. The doctrine of equitable adoption is based solely upon equitable principles and is resorted to for the sole purpose of preventing a fraud by the promisor as against the child for whose benefit the promise was made, provided the child has complied with the contract made for his benefit. The equities must be on the side of the child for whose benefit the promise was made. While the Missouri courts have used some language in which they speak of the child as having the status of an adopted child, a reading of the cases will disclose clearly that what the court meant in using such language was that the child enjoyed the status as against the defendant promisor or as against *his* estate.

Position of Petitioner Before the Missouri Supreme Court.

It is clear that petitioner relied upon some dicta in the case of *Lindsley* v. *Patterson*, 177 S. W. 826, and other cases considered and discussed in the opinion of the Supreme Court of Missouri (R. 49). These apparently led her to believe that when the contract to adopt was made, regardless

of the fact that the Missouri statutes were never complied with, she became in fact an adopted child as against the world, as fully as if the statutes had been complied with.

As above stated, the doctrine of equitable adoption is peculiar to Missouri. It is not recognized in Iowa. So that petitioner, believing she was actually adopted by the Cowgills because of the contract, sought to get a declaratory judgment to that effect in Missouri, which she could not get in Iowa, in order to inherit property in Iowa to which such decree would not entitle her in Missouri.

In said *Lindsley* case the writer of the opinion had used the following language (l. c. 831):

> "* * * I assert that any person who was capable of contracting could, at common law, adopt a minor child as his or her own son or daughter, in the same sense that he might enter into any other contract,"

and further said (l. c. 829):

> "First, was Mabel legally adopted as a child by Laura D. Patterson according to the principles of the common law?"

The Supreme Court of Missouri in the case at bar, concerning the foregoing dicta in the *Lindsley* case (R. 49), said:

> "A reading of the opinion referred to and a reference to the authorities upon which it is based indicates that the case involved an equitable adoption proceeding, the action being essentially for the specific performance of an oral contract of adoption, where a failure to decree an equitable adoption would have been a fraud on the child. In so far as the case refers to adoption according to the principles of the common law, the case has not been cited or followed."

The Missouri court stated the petitioner's position in that court as follows (R. 44):

"Appellant insists that no amount in money or property is in dispute before the court; that the action is one *in personam;* that the only issue made by the pleadings relates to the 'status' of the plaintiff; and that she did not ask any further relief. Appellant further states: 'It is true as the respondents say that the appellant seeks only a decree of adoption. * * * Since 1920 she has or she has not had the status of and has been the adopted child of Guy M. Cowgill. She needs proof of this status, alleged to have been created in Missouri, under Missouri law, and the purpose of this action is to get that proof. * * * The plaintiff seeks a decree of adoption Period. That such a decree would make her the child of Guy M. Cowgill and Lillian Cowgill, "with all of the legal relationships, rights, privileges, powers and immunities which the law creates between natural parents and their child," is a matter not of decree but rather a matter of consequence of the decree. It also is a matter of law, or consequence, rather than of the decree that *an equitable adoption creates the same relationship* which would be *created by a strict compliance with the adoption statutes of Missouri*' (Italics ours). In addition appellant contends that a *legal* adoption was effected and a *legal* status of adopted child of Guy M. Cowgill was created by the alleged contract of adoption and the admitted facts, although the contract was unperformed to the extent that 'the statutory formalities required by law relating to the adoption of children' were never complied with. Appellant insists that her *legal* status as an adopted child can be recognized and declared under the declaratory judgment act against persons who were not parties to the contract and particularly against the respondents who claim the Iowa property as the heirs at law of Mrs. Cochrane. Appellant says 'her status exists as well now as though she had been formally adopted' " (Emphasis are the court's).

And further (R. 48), the court states that appellant says "that the action is not based upon estoppel, fraud or in-

ducements but on contract, and that there was a legal adoption regardless of any compliance with statutory provisions." And further (R. 47), "appellant did not plead representations, inducements or fraud as a basis for an estoppel against any of the defendants. * * *." And further (R. 50), "appellant admits that the courts of this state have 'the exclusive right to determine that status,' and that the ownership of Iowa property is not directly involved, nor within our jurisdiction."

Holding of Missouri Supreme Court.

Upon the issues thus presented to the Supreme Court of Missouri, that court held (R. 47) that "adoption was unknown to the common law and exists in this state only by statute." The court cited with approval (R. 50) 2 Beale's "The Conflict of Laws," page 713, Section 142.1, as follows:

> "In order to create the status of adoption there must be some formal legal act; and as the common law knows no such status, it can only be created in strict and formal conformity to the terms of some statute. It cannot be created by contract or agreement."

The court held, however (R. 48):

> "It has long been recognized, however, that a person who is legally competent to adopt may enter into a binding contract whereby for a good consideration he agrees to take another as his child. Where such contract is actually made and based upon a good consideration and where it is fully performed by the person to be adopted but is not performed by the promisor during his lifetime, a court of equity will declare specific performance against the adopter's estate to the extent at least of making the adoptee an heir" (citing Missouri cases).

But the court stated (R. 51):

> "If Guy M. Cowgill had legally adopted appellant in compliance with statutory requirements, the adoption would have been binding on all persons, including the respondents, but in an equitable proceeding based upon contract, only the parties thereto, *or those in privity with them are bound*" (Emphasis ours).

(The last above emphasized part of a sentence in the opinion is the sole ground of petitioner's contention here that the decision ignored the Iowa statute, and of her further contention here that the *decision* was violative of Section 1, Article IV of the Constitution of the United States.)

A reading of the remainder of the same paragraph of the opinion discloses that the court was merely discussing the effect of a *decree of equitable adoption, if granted.* The court proceeds:

> "Equity acts only against specific individuals, and, in such case, one person may be bound and not another. A decree of equitable adoption merely forecloses 'the parties to the suit against a denial of the status that the court declares' and the status decreed exists only in equity and against the judgment defendants. As between appellant and the respondents, appellant was not, in either law or equity, the adopted child of Guy M. Cowgill *by reason of his contract to adopt her and the facts and circumstances admitted*" (Emphasis ours).

The Supreme Court of Missouri did not hold that the respondents were or were not in privity with Guy M. Cowgill, deceased.

ARGUMENT.

No Question Involving Section 1, Article IV of the Constitution of the United States Was Presented to or Decided by the Supreme Court of Missouri.

The petitioner's sole contention here, it seems to us, is that because the Supreme Court of Missouri did not decide that the respondents were in privity with Guy M. Cowgill, deceased, the court failed to give full faith and credit to the Iowa statutes. Not only did the Missouri court not decide the question of privity, but there was no occasion, under the pleadings and the presentation of the case, for a decision on that question, because the only effect of such a holding would have been to place the respondents in a class against whom, under proper pleadings and presentation of the case, a court of equity, as against them, might have invoked estoppel to deny petitioner's adoption.

It is conceded that the petitioner was never adopted under any statute of Missouri. If not estopped so to do, any party, even including the promisor, could have denied her adoption. Petitioner believed she was adopted by the contract and consequently that she did not need or desire to invoke estoppel. Certainly these respondents, even if held to be privies, could deny the adoption, unless a court of equity, under equitable consideration, held them to be estopped. As pointed out in the opinion in the case at bar, not only was estoppel not pleaded (R. 47), but "appellant says that the action is not based upon estoppel, fraud or inducements, but on contract, and that there was a legal adoption regardless of any compliance with the statutory provisions" (R. 48).

Thus it appears clear that petitioner now seeks a writ of certiorari from the Supreme Court of the United States to review a decision of the Supreme Court of Missouri on a question which not only was not presented to the latter court, but which the petitioner by her pleadings and by her presentation of the case, actually prevented the court from considering.

One cannot escape the conclusion that petitioner misconstrued the former Missouri decisions on equitable estoppel. It is clearly shown that she believed, *by reason of the contract*, that she was an adopted child, and her only purpose in seeking a declaratory judgment to that effect was, as stated to the Supreme Court of Missouri, that she might have "proof" of that adoption (R. 44). As presented to the Missouri Supreme Court, the defendants were joined in the action *not because of their claimed fictional privity with Guy M. Cowgill, or that by virtue of that privity they might be estopped to deny the adoption,* but, as stated by the court (R. 50), "the respondents were made defendants solely upon the theory that they were the collateral kin and heirs at law of Clara Cowgill Cochrane, deceased; and that they were claiming the intestate property of her estate," and accordingly interested in a determination of petitioner's status. Her action was brought as an action for a declaratory judgment, and the Missouri statute (Sec. 1136, R. S. Mo., 1939) *required her* to make parties all persons "who have or claim any interest which would be affected by the declaration," and further provided that "no declaration shall prejudice the rights or persons not parties to the proceedings."

Furthermore, the record discloses that no question as to the Missouri court's denial of full faith and credit to the Iowa statutes was raised at any time in the Supreme Court of Missouri. Not even in petitioner's motion for rehear-

ing (R. 52) was the question called to the attention of the Missouri Supreme Court (*Johnson* v. *New York Life Ins. Co.*, 187 U. S. 491, 47 L. Ed. 273). Nor was such question raised in the petitioner's motion to transfer the cause to the court *en banc* (R. 61), in which motion the petitioner merely insisted that the decision of Division No. 1 of the Missouri Supreme Court was in conflict with certain decisions of Division No. 2 of said court, and with certain decisions of said court *en banc*, although Section 9, Article V of the 1945 Missouri Constitution, makes it mandatory upon application of the losing party, for either division of the Missouri Supreme Court, where a federal question is involved, to transfer the case to the Missouri Supreme Court *en Banc*. Said section is as follows:

> "A cause in the supreme court shall be transferred to the court *in banc* when the members of a division are equally divided in opinion, or when the division shall so order, or on application of the losing party when a member of the division dissents from the opinion therein, *or a federal question is involved*, or pursuant to supreme court rule."

It therefore appears that petitioner has not exhausted her remedy in the Missouri courts (*Osment* v. *Pitcairn*, 317 U. S. 587, 87 L. Ed. 481).

Conclusion.

The writ of certiorari should be denied because

(1) Petitioner did not present the alleged federal question to the Supreme Court of Missouri;

(2) Petitioner, in failing to raise the alleged federal question in her application for transfer of the case to the Missouri Supreme Court *en Banc*, failed to exhaust her remedy in the state court;

(3) As the case was presented to the Supreme Court of Missouri, that court did not and had no occasion to pass upon the application of the Iowa statute, and therefore any claim that the Missouri court denied full faith and credit to any Iowa statute is wholly unfounded.

Respectfully submitted,

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